

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ROCHELLE L. CHAMBERS

Claimant

V.

GENERAL MOTORS, LLC

Self-Insured Respondent

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Docket No. 1,058,409

ORDER

STATEMENT OF THE CASE

Respondent appealed the November 19, 2015, Preliminary Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Troy A. Larson of Kansas City, Missouri, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 17, 2015, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

The parties stipulated claimant sustained accidental injury arising out of and in the course of her employment with respondent based upon a series of repetitive traumas through June 27, 2011. An Award signed by both parties was entered on August 14, 2012. Relying on an April 3, 2012, medical report of Dr. Michael J. Poppa, the ALJ found claimant sustained a 22 percent whole person functional impairment as a result of bilateral upper extremity injuries. The Award provides:

The respondent's duty to provide medical treatment remains after issuance of an award. Future medical treatment will be available upon agreement of the parties or upon application to the Director as benefits may be assessed pursuant to K.S.A. 44-510k. Both parties[] right to review and modification remains open.¹

¹ Award at 3.

Claimant filed an application for post-award medical requesting additional treatment to her bilateral upper extremities and requested a preliminary hearing. Following the preliminary hearing,² the ALJ granted claimant's request for right shoulder medical treatment, stating:

Under the facts presented herein, the Administrative Law Judge finds that claimant is entitled to medical care for her right shoulder condition, to include a diagnostic evaluation to determine what treatment, if any, is appropriate. This [finding] is based upon the fact that the Respondent/Self Insured is to [sic] estopped to deny claimant's treatment for the right shoulder condition, of which they had knowledge, and which claimant relied upon would resolve upon proper medical care to her bilateral upper extremities. Based upon the foregoing, it is more probably true [than] not true that Claimant's condition was part and [parcel] to the Award that was entered between the parties, and is an appropriate condition to be treated on the basis of claimant's future medical benefits under the Kansas Workers' Compensation Act.³

Respondent appeals, arguing claimant's right shoulder injury was not the result of her injuries by repetitive trauma, but rather resulted from a specific traumatic injury on October 21, 2010. Therefore, claimant's repetitive upper extremity injuries did not cause her need for right shoulder treatment. Respondent asserts claimant's request for post-award medical treatment is barred by the doctrine of res judicata.

Claimant asks the Board to affirm the Preliminary Order. She contends her right shoulder is part of her right upper extremity and the Award was based upon a series of injuries by repetitive trauma to her bilateral upper extremities.

At the preliminary hearing, respondent requested claimant's August 4, 2015, discovery deposition and an August 17, 2015, report of Dr. Erich J. Lingenfelter be placed into evidence. Claimant objected to both exhibits. Claimant's attorney indicated he received the report of Dr. Lingenfelter the day before the hearing at 4:36 p.m. Respondent's attorney indicated his office faxed Dr. Lingenfelter's report to claimant's counsel a few minutes after receiving it. The ALJ indicated he would rule on the objections after he reviewed the two exhibits. The preliminary hearing transcript contains no ruling on claimant's objections. The Preliminary Order discusses claimant's discovery deposition testimony and indicates the discovery deposition was admitted for purposes of the preliminary hearing, but does not mention Dr. Lingenfelter's report or opinions.

² All references to preliminary hearing refer to the post-award preliminary hearing held on November 17, 2015.

³ Preliminary Order at 3.

Neither party addressed claimant's objection to Dr. Lingenfelter's report in their briefs to the Board. The Board considers Dr. Lingenfelter's report part of the record. Claimant could have requested a continuance, but chose to proceed. K.S.A. 44-519 and K.A.R. 51-3-5a permit the admission of medical reports into evidence at a preliminary hearing without the necessity of the medical provider testifying. Moreover, claimant received Dr. Lingenfelter's report only a few minutes after respondent received the report from the doctor's office.

The only issue before the Board is whether claimant's repetitive upper extremity injuries caused her need for right shoulder medical treatment.

FINDINGS OF FACT

Dr. Michael J. Poppa, on April 3, 2012, evaluated claimant by order of the ALJ. The order indicated Dr. Poppa was to evaluate claimant's right and left elbows, bilateral carpal tunnel syndrome and body as a whole. Dr. Poppa was also instructed to provide a functional impairment rating.

Dr. Poppa indicated claimant reported bilateral upper extremity symptoms radiating from her elbows up to her shoulders and down her forearms and into her fingers. Claimant did not report having a right shoulder injury and when asked by Dr. Poppa if she had any remaining pain, claimant did not report having any right shoulder pain. The doctor indicated claimant had a right carpal tunnel release and surgical debridement of her right medial epicondyle and received left carpal tunnel and medial epicondyle injections. The doctor opined claimant had a 15 percent right upper extremity functional impairment as a result of her right carpal tunnel release and a 10 percent right upper extremity functional impairment for her right medial epicondyle debridement. He assigned a 5 percent left upper extremity functional impairment for her left elbow medial epicondylitis and a 10 percent left upper extremity functional impairment for her left carpal tunnel symptoms. Dr. Poppa's conclusions did not mention a right shoulder injury and his impairment ratings did not include the right shoulder.

At the preliminary hearing, claimant testified that as a result of her day-to-day work activities at respondent through June 27, 2011, she injured her hands, elbows and right shoulder. She testified that beginning in July 2010 she was treated for her right shoulder with medicine, heat and ice through plant medical. She was then referred to an outside medical provider, who performed diagnostic testing using ultrasound and x-rays. Claimant averred she was told she had right carpal tunnel syndrome and elbow tendinitis and once those were taken care of, her right shoulder should stop hurting. She testified her right shoulder pain did not resolve after her wrist and elbow treatment was completed.

Claimant, after being shown plant medical records, acknowledged that on October 21, 2010, she reported bending down to lift a shelf and as she started lifting it, felt a pop in her right shoulder. She reported feeling extreme pain shooting down her arm into

her hand. Claimant reported her injury to her supervisor and superintendent and sought treatment at plant medical. She was sent by plant medical to the Providence Medical Center emergency department. Claimant testified:

Q. (By Mr. Larson) Ms. Chambers, the current problems that you're having with your right shoulder, you relate those back to this October 21st, 2010, injury, isn't that correct?

A. Yes.⁴

At the preliminary hearing, the parties introduced numerous exhibits, including the August 4, 2015, discovery deposition of claimant, the original Award, the January 31, 2012, order appointing Dr. Poppa to evaluate claimant and numerous medical records from before and after June 27, 2011, claimant's date of injury by repetitive trauma.

At her discovery deposition, claimant testified she injured her right shoulder in 2011, but could not recall what month. She described the mechanism of injury similarly to that when she later testified at the preliminary hearing. Claimant testified she went to plant medical, where she was examined. She testified she did not receive treatment for her right shoulder. When claimant testified at her discovery deposition, she still had right shoulder and bilateral pain in her elbows, hands, wrists and fingers. Working increases her pain.

Claimant indicated that when she started at the Kansas City plant in January 2010, she installed air bags in 425 automobiles per shift. In January 2011, she moved to installing shelf boards. A shelf board is a piece that goes behind the rear seats of automobiles. She estimated she performed this task on 425 to 500 automobiles per shift. About six months after undergoing her right upper extremity surgery, claimant was made a team leader, performing up to 16 different jobs, including installing carpet, deck lids, taillights, seat belts, BCM modules and bolting door handles. In June 2014, claimant gave up her team leader job in order to stay on the same shift and moved to installing seat belt covers and bolting down seats. That job involved using two different torque guns and she would work on 425 cars per shift.

On September 9, 2014, claimant went to plant medical for pain in her right shoulder, elbow and hand. She testified her right shoulder swelled badly and she was sent to a specialist to make sure she did not have cancer. Claimant underwent an ultrasound and the technician who conducted the ultrasound indicated the swelling was a muscle aggravated by a nerve.

In November 2014, claimant transferred to respondent's Indiana plant where she placed transmission castings on a press and trimmed them, took them off the press and

⁴ P.H. Trans. at 18-19.

placed them on a conveyor, put them in the dungeon and placed a shipping label on them to be shipped. Claimant explained the casting is the outer shell of the transmission and the dungeon is a plastic container. Claimant indicated she worked with parts weighing from 20 to 26 pounds on up to heavier parts requiring two people working together. Claimant denied that on December 23, 2014, she told plant medical in Indiana that she injured her wrists and right shoulder and elbow while lifting parts since she came there.

Claimant indicated that while working at the Indiana plant, she went to plant medical many times for ice and heat for her shoulder, elbow and hands. According to claimant, the nurse gave her ice, heat and ibuprofen, but the doctor would not examine her or send her to a specialist as claimant was injured in Kansas.

Claimant indicated she went to plant medical on June 11 or 12, 2015, to get heat, ice or ibuprofen for her pain. She spoke to a nurse, who wanted to give her restrictions. The nurse then talked to the doctor, who refused to give claimant restrictions because her injuries occurred in Missouri.⁵ The doctor would not refer claimant to a specialist. Claimant transferred back to respondent's Kansas City plant in July 2015.

When asked if her right shoulder was involved in her 2012 settlement,⁶ claimant testified, "It wasn't involved in that claim, no. It was just the hands and the elbow, I think."⁷ However, she also testified that her right shoulder pain started at the same time as her carpal tunnel syndrome and tendinitis. She testified she was told that her right shoulder pain was because of her nerve and once she had her right wrist and elbow surgery, her right shoulder pain would go away, but it never did.

Dr. Paul F. Nassab first saw claimant on June 27, 2011. The history of present illness in his report does not mention claimant's right shoulder. His notes from the visit discuss at length claimant's bilateral elbow, wrist and hand conditions. Dr. Nassab performed claimant's right carpal tunnel release and right elbow debridement. The doctor's August 3, 2011, operative report discusses claimant's bilateral carpal tunnel syndrome and medial epicondylitis, but does not mention her right shoulder. Dr. Nassab's notes from claimant's follow-up appointments from August through November 2011 do not make reference to her shoulder.

A December 6, 2011, report of Dr. Daniel D. Zimmerman, employed by claimant's attorney to evaluate claimant, indicated claimant's chief complaint was pain and discomfort affecting the bilateral upper extremities, specifically the right wrist and elbow, pain in her left elbow and numbness and tingling in the left 3rd and 4th digits. Dr. Zimmerman

⁵ The doctor thought claimant worked in Missouri when, in fact, she worked in Kansas.

⁶ On several occasions, the parties refer to claimant's award as a settlement.

⁷ P.H. Trans., Resp. Ex. 1 (claimant's August 4, 2015, discovery deposition) at 52.

physically examined claimant's upper extremities. Dr. Zimmerman's report mentions no right shoulder complaints by claimant, nor did he note claimant having any right shoulder symptoms or injury. In his summary, Dr. Zimmerman noted claimant developed pain and discomfort affecting the elbows, hands, wrists and digits in carrying out repetitive work duties at respondent. The doctor's functional impairment ratings were for her wrists and elbows and did not include her right shoulder.

Claimant's records from plant medical were placed into evidence. A July 13, 2010, note indicates claimant complained of right hand, arm and shoulder pain. She again complained of shoulder pain on July 21. Claimant made right shoulder complaints on July 23, 2010, when she complained of discomfort and requested ice. An ice pack and ibuprofen were provided. A note in the medical records lists several diagnoses from July 2010 through June 2011. Two of those diagnoses, made on July 26, 2010, were a right shoulder and upper arm sprain/strain and a right wrist sprain/strain. Claimant reported using her right hand and arm to reach down inside a motor and having to twist her arm outward to reach a bolt when she felt shooting pain. She was referred to North Kansas City Occupational Medicine (NKC OCC). A July 28 plant medical note indicated that a work status report from NKC OCC diagnosed claimant with right shoulder, wrist and hand strains. On that date, claimant requested ice for her right shoulder.

Claimant returned to plant medical on August 2, 2010, and requested heat instead of ice for her right shoulder. An August 4 note stated claimant saw Dr. Ryan at NKC OCC, who diagnosed claimant with right shoulder, hand and wrist strains and provided claimant restrictions.

On October 21, 2010, claimant was escorted to plant medical by her supervisor. The notes indicated claimant reinjured her shoulder on the job on which she previously injured it. She was lifting a shelf board and felt a pop in her right shoulder and shooting pain down her arm to her fingers. Claimant was referred for an MRI and sent to Providence Medical Center.

October 21, 2010, records from Providence Medical Center indicated claimant reported injuring her right shoulder while lifting an object at work. X-rays were taken and claimant was diagnosed with a strained right shoulder.

An October 26, 2010, MRI revealed, among other things: (1) no microtrabecular injury or fracture, (2) a small posterior lateral subchondral cyst, (3) the AC joint was intact without substantial arthropathic change, (4) a mild degree of periarticular inflammation and capsulitis, (5) minimal anterior lateral downsloping of the acromion without high-grade outlet stenosis or substantial subacromial spurring, (6) the supra- and infraspinatus tendons were mildly tendinopathic and (7) tiny interstitial tears involving the supraspinatus tendon as well as a moderate degree of inflammation of the subacromial/subdeltoid bursa.

On October 28, 2010, claimant returned to plant medical. The diagnoses were right shoulder rotator cuff tendinitis and bursitis. At that visit, claimant also complained of right arm, elbow and hand pain.

Plant medical records dated November 10, 2010, indicated a fax was received from GM benefits stating claimant's workers compensation claim was denied. Claimant again went to plant medical on January 28, 2011, for pain in her right shoulder. Notes from that visit state "EMPLOYEE PRESENTS TO MEDICAL FOR PAIN IN RIGHT SHOULDER FROM CASE FILED IN THE FALL."⁸ The shoulder was iced and claimant was given anti-inflammatory medications. Claimant again went to plant medical on March 29, 2011, and complained that her right shoulder never fully healed and she stated she possibly was to receive orders for physical therapy. Plant medical records dated November 22, 2011, indicated claimant saw Dr. Frederick A. Buck for her wrists and elbows, as well as her right hand and shoulder.

September 9, 2014, plant medical records indicated claimant reported having continued pain in her right arm and wanted ice for her right elbow and heat on her right shoulder. The note indicated the matter was being litigated and claimant would have to petition the court for future medical treatment. On October 9, 2014, claimant reported her right hand, arm, shoulder and area by her neck hurt. She reported a lump on her right shoulder really hurt. On October 15, 2014, she requested from plant medical an ice pack for her right shoulder. She returned to plant medical on December 23, 2014, because of pain in her wrists, right elbow and shoulder.

Plant medical records indicated that in 2015 claimant visited several times for shoulder pain, including February 19. She reported a right shoulder lump on June 4, 2015, that she felt was work related. She reported her symptoms began that day and were caused by repetitive lifting of die casting off a rack. She went to plant medical for her right shoulder on May 27. On June 18, claimant was treated for her right shoulder with a cold pack for 20 minutes and given Aleve. On July 27, Dr. Cheng diagnosed claimant with, among other conditions, right shoulder impingement.

Dr. Lingenfelter, at the request of respondent, evaluated claimant's right shoulder on August 17, 2015. Claimant reported her bilateral carpal tunnel and elbow injuries to Dr. Lingenfelter and attributed them to her repetitive motion activity at work. She indicated pain radiated into her shoulder and had resolved for a while. After her claim was settled, she did not complain of shoulder symptoms until September 9, 2014. Claimant also reported lifting an object in 2010 and feeling a lot of shoulder pain. The doctor noted claimant did not voice significant complaints at that time.

⁸ *Id.*, Resp. Ex. 7.

Dr. Lingenfelter physically examined claimant and reviewed the reports of Drs. Poppa and Prostic. Dr. Lingenfelter ordered right shoulder x-rays, which he indicated showed mild AC joint degenerative changes. His assessment was chronic right upper extremity pain. He opined:

Given that she is a very poor historian and could not even remember a specific point in time, but may be referencing some overhead position and lifting an object it is reasonable to conclude that the 2010 complaints and the incident that she reported with the shelf board job is the cause for her shoulder complaints, but may have been masked or part of the pain spectrum of the carpal tunnel and the neuropathic problems with her right shoulder. I would say based on that the primary prevailing factor was the 2010 incident for her right shoulder and that the investigation for this would need to be an MR/arthrogram to determine if there was true structural damage at that time.⁹

At the request of her attorney, claimant was evaluated by Dr. Edward J. Prostic on October 2, 2015. Claimant gave a history of injuring her upper extremities from repetitive minor trauma and continuing to have shoulder symptoms. She reported usually welding at shoulder level and performing other tasks that require her to use her hands above shoulder level. Dr. Prostic's report does not mention the October 21, 2010, shelf board lifting incident. Dr. Prostic took right shoulder x-rays, which he indicated showed a Type II acromion. He indicated claimant should undergo a right shoulder MRI and anti-inflammatory medications, physical therapy and steroid injections should be considered. The doctor opined claimant's repetitive trauma through June 27, 2011, and continuing while employed by respondent was the prevailing factor causing her injury, medical condition and need for medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹⁰ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."¹¹

K.S.A. 2011 Supp. 44-510k(a), in part, provides:

⁹ *Id.*, Resp. Ex. 2 at 2-3.

¹⁰ K.S.A. 2011 Supp. 44-501b(c).

¹¹ K.S.A. 2011 Supp. 44-508(h).

(1) At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523, and amendments thereto.

(2) The administrative law judge can (A) make an award for further medical care if the administrative law judge finds that it is more probably true than not that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care and that the care requested is necessary to cure or relieve the effects of such injury, or (B) terminate or modify an award of current or future medical care if the administrative law judge finds that no further medical care is required, the injury which was the subject of the underlying award is not the prevailing factor in the need for further medical care, or that the care requested is not necessary to cure or relieve the effects of such injury.

Claimant argues her need for right shoulder treatment was caused by her upper extremity injuries by repetitive trauma. Claimant asserts her Award is for a functional impairment to her upper extremities and her right shoulder is part of her right upper extremity and future medical was left open. Therefore, she asserts the right shoulder treatment she requests is covered by her Award. This Board Member disagrees.

The Award relies primarily on the report of Dr. Poppa, who evaluated claimant at the ALJ's request. Dr. Poppa rated claimant for a right carpal tunnel release, right medial epicondyle debridement, left carpal tunnel symptoms and left elbow medial epicondylitis. Dr. Poppa's conclusions do not mention a right shoulder injury and his impairment ratings do not include the right shoulder.

It is significant that Dr. Nassab, claimant's treating physician, saw claimant several times, but did not reference a right shoulder injury. Claimant's own expert, Dr. Zimmerman, does not mention a right shoulder injury in his report. It is logical that if claimant had a right shoulder injury that was part of her bilateral upper extremity claim, her own expert would have evaluated her for said injury.

Admittedly, plant records show claimant complained of shoulder symptoms prior to the October 2010 shelf board incident. On October 21, 2010, claimant reported a "pop" in her shoulder. That is not a repetitive injury, but rather a single traumatic accident. Claimant's testimony that her right shoulder issues relate back to the October 2010 shelf board incident convinces this Board Member that her right shoulder injury occurred on October 21, 2010, and was not part of her bilateral upper extremity injuries by repetitive trauma.

This Board Member does not put much stock in the report and opinions of Dr. Prostic. Dr. Prostic's report does not mention the October 2010 shelf board incident. Without being aware of that incident, the doctor cannot rule it out as a cause of claimant's right shoulder issues. Conversely, Dr. Lingenfelter was aware of the October 2010 shelf board incident and opined that incident was the cause of claimant's shoulder complaints.

Respondent's argument that claimant's post-award medical treatment request is barred by res judicata is moot.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹³

WHEREFORE, the undersigned Board Member reverses the November 19, 2015, Preliminary Order entered by ALJ Howard.

IT IS SO ORDERED.

Dated this ____ day of February, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge

¹² K.S.A. 2014 Supp. 44-534a.

¹³ K.S.A. 2014 Supp. 44-555c(j).